IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.40 OF 2007
IN
NOTICE NO.N/224 OF 2006

Re.: Kishor K. Mehta ...Judgment Debtor

Exparte:

HDFC Bank Limited ...Judgment Creditor

Kishore Jain i/by K.Ashar and Company for HDFC-Judgment Creditor.
Shri F.E. D'Vetre, Sr. counsel with Mr. Venkatesh Dhond i/by Shri T.N.Tripathi for the Judgment Debtor.

ALONGWITH
NOTICE OF MOTION NO.112 OF 2006
IN
NOTICE NO.N/100 OF 2006

Re.: Mr.Harbhajan Singh Jamitsingh
Dhillan & Ors. ...Judgment Debtors

Exparte:

Bank of India ...Judgment Creditors

Shri J.P.Sen with Ms.Kavita Shah i/by Arvind G. Shah for the Judgment Debtors.
Shri R.N.Singh i/by M/s.Singh & Co for the Judgment Creditors.

ALONGWITH
INSOLVENCY NOTICE NO.N/90 OF 2006

Re.: Ashish Subedar Tiwari & Ors ...Judgment Debtors

Exparte:

The Bharat Co-operative Bank
(Mumbai) Limited ...Judgment Creditors

None for the Judgment Debtors.
Dr. D.R. Talankar i/by Shri U.S.Borade for the Judgment Creditors.

AND
INSOLVENCY PETITION NO.81 OF 2005

Re.: Smt.Chandra Vishnu Choudhari

and another ...Judgment Debtors

Exparte:

Samradh Co-operative Credit Society Limited ...Petitioning Creditor

None for the Insolvent.
Ms K.K. Shah for Petitioning Creditor.

CORAM : ABHAY S.OKA, J.

DATE ON WHICH ORDER IS RESERVED : AUGUST 21, 2007.

DATE ON WHICH ORDER IS PRONOUNCED:SEPTEMBER 04, 2007.

P.C.:

1. By this order I am deciding the following questions which have arisen for consideration:

(i) Whether the decision of this Court in the case of Re. Deepak Cochhar and Anr-Debtors and Indusindh Bank Limited- Creditors (2006(3) Bombay Cases Reporter Page 520) is no longer a good law in view of the decision of the Apex Court in the case of Paramjeet Singh Patheja Vs. ICDS Ltd (JT 2006 (10) SC 41)?

(ii) Whether an insolvency notice under sub section 2 of section 9 of the Presidency Towns Insolvency Act, 1909 (for short PI Act) can be issued on the basis of a recovery certificate issued under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993

(hereinafter referred to as the RDB Act)?

(iii) Whether an insolvency notice under sub section 2 of section 9 of the PI Act can be issued on the basis of an Award made by a Co-operative Court under section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short the Co-operative Societies Act)?

(iv) Whether an insolvency notice under section 2 of section 9 of the PI Act can be taken out on the basis of a recovery certificate issued under section 101 of the Co-operative Societies Act?

(v) Whether an insolvency notice under sub section 2 of section 9 of the PI Act can be issued on the basis of an Award of the arbitrator in a dispute under section 84 of the Multi-State Co-operative Societies Act, 2002 (hereinafter referred to as the Multi-State Societies Act)?

2. Several matters were fixed before this Court involving the aforesaid issues. Therefore, I permitted the counsel appearing for the various parties in various proceedings to address me on the aforesaid questions. I have accordingly heard submissions of the counsel appearing for the parties

on 07th August, 2007 and 21st August, 2007.

3. In Notice of Motion No.40 of 2007 in Insolvency Notice No.226 of 2006, the learned senior counsel Mr. D'Vetre appearing for the Judgment Debtor has made detailed submissions. He relied upon the decision of the Apex Court in the case of Paramjeet Singh Patheja (supra). He invited my attention to the submissions made before the Apex Court and in particular in clause Nos.(i), (j) and (k) of paragraph No.14 of the said decision. He submitted that the recovery certificate issued by the Debt Recovery Tribunal is neither a decree nor an order within the meaning of sub-section 2 of section 9 of the PI Act. He submitted that in paragraph No.27 of the said decision the Apex Court has held that the provisions of the PI Act have to be construed strictly. He, therefore, submitted that the view taken by this Court in the case of Deepak Cochhar that restrictive meaning cannot be given to the words "Decree" or "Order" is no longer a good law. He submitted that the view taken by the learned single Judge that provisions of sub section 2 of section 9 of the PI Act must be given widest possible interpretation is not correct in view of the decision of the Apex Court in the case of Paramjeet Singh Patheja (supra). He submitted that the test laid down by the Apex Court in the aforesaid decision is that

the "Decree" or "Order" contemplated by sub section 2 of section 9 must be of a Court. He submitted that the Apex Court has held that the "Decree" or "Order" contemplated by sub section 2 of section 9 must be of a Civil Court under the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code"). He submitted that another test laid down by the Apex Court is that the proceeding in which "Decree" or "Order" is passed must be initiated on the basis of a plaint. He submitted that the proceedings before a Debt Recovery Tribunal are not initiated on the basis of the plaint. He submitted that the Apex Court has held that the words "Decree" and "Order" used in the section are as understood under the said Code. He submitted that the Apex Court has held that the Bombay amendment of the year 1939 and later Central amendment of the year 1978 intended to refer to only the "decrees" and "orders" as defined under the said Code. He submitted that all the Tribunals are not Courts and therefore, Debt Recovery Tribunal cannot be termed as a Court. He invited my attention to the conclusions recorded by the Apex Court in paragraph No.60 and submitted that the recovery certificate issued by the Debt Recovery Tribunal is neither a "Decree" nor an "Order". He submitted that the adjudication made by the Debt Recovery Tribunal cannot be treated as an adjudication made in a suit.

4. He also invited my attention to the decision of the Apex Court in the case of **Diwan Brothers Vs. Central Bank of India (AIR 1976 Supreme Court Page 1503)** and in particular paragraph Nos.9 and 11 of the said decision. He submitted that the recovery certificate issued by the Debt Recovery Tribunal cannot be a decree in view of the tests laid down by the Apex Court. He submitted that the Apex Court in the case of Paramjeet Singh Patheja has relied upon the said decision in the case of Diwan Brothers (supra). He placed reliance on a decision of Calcutta High Court in the case of **State Bank of India Vs. Madhumita Construction (Pvt) Ltd and others reported in AIR 2003 Calcutta Page 7**. He submitted that the a Debt Recovery Tribunal is not a Court under the said Code. He submitted that the decision of the learned single Judge in the case of Deepak Cochhar (supra) is no longer a good law. He pointed out that the view taken by the learned single Judge of this Court in the case of **Sidharth Srivastava Vs. K.K.Modi Investment & Financial Service Private Limited (2002(4) Maharashtra Law Journal Page 281)** has been upheld by the Apex Court in the case of Paramjeet Singh Patheja. He pointed out that this Court held that though the Award is enforceable as if it were a decree, the same does not become a decree. He submitted that a legal

fiction must be limited for the purpose for which it is created. Shri Sen appearing in Notice of Motion No.112 of 2006 has made similar submissions by relying upon the said decision of the Apex Court.

5. Shri Jain appearing for the Judgment Creditor invited my attention to various provisions of the PI Act. He also invited my attention to the relevant provisions of the RDB Act. He pointed out the qualifications laid down by the RDB Act for appointing a person as a presiding officer of a Debt Recovery Tribunal. He pointed out that only a person who is qualified to be a District Judge can be a presiding officer of the said Tribunal. He placed reliance on section 19 of the RDB Act. He pointed out that there are various provisions therein which permit the Defendant to file a counter claim or to claim a set off against the claim of the Plaintiff. He pointed out that the proceeding before the Tribunal are required to be initiated on the basis of an Application which is nothing but a plaint. He submitted that the very fact that section 19 requires written statement to be filed and permits counter claim or set off shows that the proceedings before the Debt Recovery Tribunal are initiated on the basis of an Application which is nothing but a plaint. He pointed out that an elaborate adjudication is required

to be made by the Debt Recovery Tribunal. He pointed out sub-section 20 of section 19 which requires the Debt Recovery Tribunal to pass a final order. He pointed out that a recovery certificate is required to be issued on the basis of the final order passed by the Tribunal. He submitted that though by virtue of provisions of section 22 of the RDB Act, the Tribunal is not bound by the procedure laid down in the said Code, the Tribunal possesses all the trappings of a Civil Court as indicated by section 23 and 25. He pointed out that even the provisions of the Limitation Act, 1963 are applicable. He pointed out that sub section 25 of section 19 confers an inherent power on the Tribunal which is on par with section 151 of the said Code. He pointed out that infact section 31 provides for transfer of pending suits to the Debt Recovery Tribunal. He also invited my attention to provisions of section 31A of the RDB Act. He submitted that the Tribunal has power to issue a recovery certificate on the basis of a decree or order passed by any Court before commencement of the said Act.

6. Shri Jain further submitted that in clause (e) and (h) of sub section 1 of PI Act there is a specific reference to a decree of "any Court" and whereas the words "Decree" or "Order" used in sub section 2 of

section 9 are not qualified by the words "of any Court". He submitted that in the case of Paramjeet Singh Patheja the issue which arose for consideration was that whether an Award passed under the said Act of 1996 can be the basis of an insolvency notice. He submitted that the only issue which is decided by the Apex Court is whether an Award made by the arbitrator is a decree within the meaning of sub section 2 of section 9. He submitted that the Apex Court in the said decision has made a distinction between a Court and Tribunal created by the machinery of the State on one hand and an arbitrator appointed by the parties on the other hand. He submitted that the Apex Court has held that the basic and fundamental feature which is common to both Courts and Tribunals is that they discharge judicial function and exercise judicial powers which inherently vests in the sovereign State. He, therefore, submitted that ratio in the case of Paramjeet Singh Patheja (supra) has no applicability to the case where insolvency notice is sought to be taken out on the basis of an order passed by the Debt Recovery Tribunal.

7. The learned counsel appearing for the Judgment Debtor in rejoinder stated that section 31A of the RDB Act applies to only "Decrees" or "Orders" passed by any Court only before commencement of the RDB Act. He

invited my attention to sub section 5 of section 9 of the PI Act and submitted that sub section 5 refers to the decree or order passed in any suit or proceedings. He further submitted that the reference to the word "proceeding" in sub section 5 is to an interim proceedings.

8. Shri Samdani, the learned senior counsel also made submissions. Though he has generally adopted the submissions made by Shri Jain, he submitted that the definition of a "debt" under section 2(b) of the PI Act is an inclusive definition. He pointed out that in sub- section 2 of section 9, the words "Decree" or "Order" are not qualified by providing that the "Decree" or "Order" must be by a Court. He submitted that when an order is passed by a Debt Recovery Tribunal after adjudication, the order passed by the Tribunal will be an order within the meaning of sub section 2 of section 9 of the PI Act. He relied upon the dictionary meaning of the words "Decree" and "Order". He relied upon a decision of Allahabad High Court in the case of **Mrs.Panzy Fernandes Vs. Mrs. M.F.Queros and others (AIR 1963 All 153)**.

9. Dr. Talankar appearing in the Insolvency Notice No.90 of 2006 submitted that an insolvency notice under section 9(2) of the PI Act can be issued

on the basis of a recovery certificate under section 101 of the Co-operative Societies Act. He submitted that the certificate under section 101 of the Co-operative Societies Act is an order which is covered by sub section 2 of section 9 of the PI Act. He submitted that the order under section 101 of the Co-operative Societies Act is required to be issued after making an adjudication. He pointed out that the authority i.e the Registrar or Deputy Registrar who decides the proceeding under section 101 of the Co-operative Societies Act has an authority to adjudicate upon the dispute between the parties as regards liability to pay the amount. He submitted that the proceeding under section 101 of the Co-operative Societies Act commences on the basis of Application which has to satisfy all the requirements of the plaint. He submitted that in view of the recent decision of the Apex Court in the case of **Greater Bombay Co-operative Bank Limited Vs. M/s.United Yarn Textiles Private Limited and others (Civil Appeal No.432 of 2004)** the remedy under section 101 of the Co-operative Societies Act will have to be treated on par with a remedy available to a bank under the RDB Act. Shri Vengurlekar, learned counsel supported the submission of Dr.Talankar. However, he submitted that an order passed under section 101 of the Co-operative Societies Act will be a decree within

the meaning of sub section 2 of section 9 of the PI Act. He invited my attention to section 156 of the Co-operative Societies Act and Rule 2(d) of the Maharashtra Co-operative Societies Rule 1961 and submitted that in view in view of clause (a) of sub section 1 of section 156, a certificate under section 101 or under section 137 will have to be treated as a decree. He relied upon a decision of this Court in the case of **Rupchand R. Shah Vs. Janata Consumers Co-operative Society (AIR 1988 Bom Page 193)** and submitted that the Registrar exercises power of a Court.

10. I had requested Shri Kishore P. Jain, the learned counsel to make submissions on the issue relating to section 101 of the Co-operative Societies Act. His submission is that an order of recovery certificate under section 101 of the Co-operative Societies Act is neither a decree nor an order under section 9(2) of PI Act. He submitted that the enquiry contemplated by section 101 is a summary enquiry. He placed reliance on a decision of learned single Judge of this Court in the case of **Vasan Joganputra Vs. Bank of India Staff Sanpada Co-operative Housing Society Limited (2005(1) Bombay Cases Reporter Page 86)**. He submitted that this Court has held that while deciding an Application under section 101 the

Registrar is not expected to engage himself in the process of long drawn adjudication or to analyse each aspect or arguments. He submitted that while deciding an Application under section 101 of the Co-operative Societies Act the authority has to only broadly consider the main issue as to whether the concerned member was in arrears and whether the claim of the society is substantiated. He submitted that this Court has held that a recovery certificate has to be based on a resolution of the society authorising the demand. He submitted that on plain reading of sub section 2 of section 156 of the Co-operative Societies Act, the Registrar is a Civil Court only for the purpose of applicability of law of limitation and for enforcing the recovery certificate. He submitted that this Court has repeatedly held that a recovery certificate is not a decree. He submitted that the Apex Court has held that in the case of Paramjeet Singh Patheja (supra) that the "Order" or "Decree" contemplated by sub section 2 of section 9 must be by a Court and not by a Tribunal. Shri Nikam supported the submissions made by Shri Jain.

11. Shri C.K.Tripathi, the learned counsel submitted that though there is a power vesting in the Registrar under section 101 to issue recovery certificate as regards payment of amounts advanced by

the Co-operative Banks. He submitted that the enquiry under section 101 of the Co-operative Societies Act is a summary enquiry and considering the drastic nature of the consequences of an insolvency notice, the order made under 101 cannot be termed as an order under sub section 2 of section 9.

12. The learned counsel Dr.Talankar made submissions on the question whether an Award made by a Co-operative Court in a dispute covered by section 91 of the Co-operative Societies Act is a "Decree" or "Order" on the basis of which an insolvency notice can be taken out. He submitted that the jurisdiction of ordinary Civil Court in respect of cases covered by section 91 has been withdrawn and the same has been conferred on a Co-operative Court. He submitted that the Judges of the Co-operative Courts are judicial officers and the dispute under section 91 is to be initiated by a dispute which is in the nature of a plaint. He submitted that the procedure to be followed by the Co-operative Court while deciding the dispute is on par with the procedure followed by the Civil Court while deciding the civil suit. He relied upon the judgment of the Apex Court in the case of Paramjeet Singh Patheja (supra) and submitted that Co-operative Court is a Court which is created by the machinery of the State and therefore an Award made in

dispute under section 91 is a decree.

13. Shri Vengurlekar appearing in Notice of Motion No.58 of 2007 in Insolvency Notice No.36 of 2007 submitted that an Award made by an Arbitrator by deciding the dispute covered under section 84 of the Multi-State Societies Act is a decree. He pointed out that the arbitration under section 84 is a statutory arbitration and the arbitrator is appointed by the Registrar appointed by the Central Government. He submitted that the dispute which is governed by the section 84 of the Multi-State Societies Act is governed by law of limitation which is applicable to ordinary Civil Suit. He, therefore, submitted that an insolvency notice under section 9(2) can be taken on the basis of an Award made in a dispute governed by section 84 of the Multi-State Societies Act.

14. I have carefully considered the submissions. Relevant part of sub section 2 of section 9 reads thus:

> "(2) Without prejudice to the provisions of sub-section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has

> become final and the execution whereof has not been stayed), has served on him a notice (hereinafter in this section referred to as the insolvency notice) as provided in sub-section (3) and the debtor does not comply with that notice within the period specified therein:"

It will be necessary to refer to the decision of this Court in the case of Re.Deepak Cochhar and others (supra) (the said case is hereinafter referred to as the case of Deepak Cochhar). The question which arose for consideration before the learned single Judge in the said case was whether a notice of insolvency under sub section 2 of section 9 of the PI Act can be issued on the basis of a recovery certificate issued by the Debt Recovery Tribunal under the RDB Act. The learned single Judge came to the conclusion that the words "Decree" or "Order" used in sub section 2 of section 9 were not qualified with the words "of any Court". The learned Judge therefore held that it is not permissible to restrict the meaning of the said words "Decree" or "Order" by resorting to and relying upon sub-section 2 and sub-section 14 of section 2 of the said Code. The learned Judge held that it is not permissible to give a restrictive meaning to the words "Decree" or "Order" particularly under sub section 2

of section 9 of the PI Act so as to defeat the provisions of law and the provisions of sub section 2 of section 9 must be given a widest possible interpretation. The learned Judge held that the issuance of recovery certificate is a procedural requirement for the purposes of execution of an order of recovery passed by the Debt Recovery Tribunal under sub section 20 of section 19 of the RDB Act. The learned Judge held that once a Debt Recovery Tribunal has passed an order after adjudicating the dispute between the parties, such order is executable in law and on the basis of such order an insolvency proceedings can be initiated under sub section 2 of section 9 of the PI Act. The learned Judge further held that the proceeding under the PI Act is a proceeding in rem.

15. In the case of Paramjeet Singh Patheja (supra) the issue before the Apex Court was whether an arbitration Award is a decree for the purposes of section 9 of the PI Act and whether an insolvency notice can be issued under sub section 2 of section 9 of the PI Act on the basis of an arbitration Award. The Apex Court held that an arbitration Award is neither a decree nor an order for payment within the meaning of section 9(2) of the PI Act. The Apex Court held that an Award is not rendered in a suit. It was

further held that an arbitral proceeding is not commenced by institution of plaint. The Apex Court held that the provisions of section 9 must be given a strict construction considering the fact that under the PI Act a person who is adjudged as an insolvent suffers a "civil death". The Apex Court made a distinction between the Court or Tribunal created by the State and an Arbitral Tribunal which is not a creation of State.

16. In the case of Deepak Cochhar (supra), while holding that an insolvency notice can be taken out on the basis of the recovery certificate under RDB Act, the reasoning adopted by the learned single Judge is as under:

(i) The words "Decree" or "Order" used in sub-section 2 of section 9 are not qualified by the words "of any Court";

(ii) It is not permissible to restrict the meaning of the words "Decree" or "Order" by taking recourse to definition of the said words under section 2 of the said Code;

(iii) The words "Order" or "Decree" must be given its full meaning and its full effect under

sub section 2 of section 9 of the PI Act;

(iv) The words "of any Court" have not been deliberately used by the legislature though it was conscious of the same because in clause (e) and clause (h) of sub section 1 of section 9 of the PI Act the said words have been expressly used;

(v) It is not permissible to give a restrictive meaning to the words "Decree" or "Order" as contemplated under sub section 2 of section 9 of the PI Act so as to defeat the provisions of the Act in case where a claim is adjudicated by any other authorities other than the Court of law as contemplated by sub sections (2) and (14) of section 2 of the said Code;

(vi) Provisions of sub section 2 of section 9 must be given widest possible interpretation and meaning so as to include each and every kind of recoveries which are adjudicated and have achieved finality so as to enable the Judgment Creditor to effectively seek recovery of his dues;

(vii) The proceedings under the PI Act are in rem which are for benefit of all creditors and not for individual creditor and therefore it is not permissible to interpret the provisions of PI Act in a restrictive manner;

(ix) A recovery certificate is issued on the basis of an order passed by the Debt Recovery Tribunal after adjudicating upon the claims between parties is executable in law and on the basis of such order an insolvency proceedings can be initiated under sub section 2 of section 9 of the PI Act.

17. Thus, in substance what has been held is that the recovery certificate is nothing but an order passed by the Debt Recovery Tribunal which is an order within the meaning of sub section 2 of section 9 of the PI Act.

18. Now turning to the decision in the case of Paramjeet Singh Patheja (supra), the questions of law which were decided by the Apex Court have been incorporated in paragraph No.12 of the decision. The said questions read thus:

"i. Whether an arbitration award is a "Decree" for the purpose of Section 9 of the Presidency Towns Insolvency Act, 1909?

ii. Whether an insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award?"

19. The Apex Court has referred to amendments made to section 9 by Amending Act of 1978. By the Amending Act, sub section 2 of section 9 was introduced. Sub section 2 was introduced alongwith other sub sections of section 9. The Apex Court noted the use of the words "of any Court" in clause (e) and (h) of sub section 1 of section 9. The conclusions drawn by the Apex Court can be summarised as under:

(i) In paragraph 27 the Apex Court held thus:

". **We are of the view that The Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of 'civil death' for a person sought to be adjudged an insolvent and therefore the Act has to be construed strictly.** The Arbitration

Act was in force when the PTIA came into operation. Therefore there can be seen that the law makers were conscious of what a ‘decree’, ‘order’ and an ‘award’ are. Also the fundamental difference between ‘courts’ and ‘arbitrators’ was also clear as far back as in 1909". (Emphasis supplied)

(ii) In paragraph 30 the Apex Court held thus:

"It is obvious that an arbitrator is not a court, an arbitration is not an adjudication and, therefore, an award is not a decree".

(iii) The Apex Court relied upon definition of "Order" in sub section 14 of section 2 of the said Code and held that the use of the words "decision" and "Civil Court" in the objects and reasons of 1978 amending Act unambiguously rule out an Award by arbitrators.

(iv) The Apex Court dealt with the Bombay Amendment made by an Act of 1939 by which clause No.(i) was added after clause (h) of section 9 which introduced the provision of a creditor serving an insolvency notice on the basis of a "Decree" or an "Order" of payment of any amount due to him.

(v) In paragraph Nos.41 and 42 of the decision of the Apex Court, it is held thus:

> "41. When the Bombay Amendment came into force on 19.6.1939 by Bombay Act No.51 of 1948, clause (i) was added to section 9. Section 9 speaks of a 'decree' and introduces the word 'order'. After so many years of the CPC being in force the Bombay Legislature knew that meaning of 'Decree' and 'Order' and used those terms as understood under the CPC.
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> 42. **The fact that the Bombay Amendment and later the Central Amendment intended to refer only to decrees and orders as defined in the CPC is clear from the Statement of Objects and Reasons of the Central Amendment Act No.28 of 1978 which introduced sub-sections (2) to (5) in Section 9"**.(Emphasis supplied)

(vi) In paragraph No.43 after referring to the objects and reasons of 1978 amendment, it was held that "**the words 'litigant', 'money decree', 'judgment-debtor', 'decretal amount' and 'decree-holder' plainly show that Parliament intended to deal with litigants who do not pay amounts decreed**

by civil courts. There is no reference at all to arbitrations and awards in the Statement of Objects and Reasons and in sub-section (2) to (5) of Section 9, which were introduced in 1978 by Parliament". use of word "litigant", "money decree" and Judgment Debtor" in statements of objects and reasons of 1978 Amendment Act clearly shows that the Parliament intended to deal with litigants who did not want to pay the amounts decreed by the Civil Courts" (Emphasis supplied).

In paragraph No.47 the Apex Court held thus:

> ". Tribunals occupy a special position of their own under the scheme of our Constitution. Special matters are entrusted to them and in that sense they share with the courts one common characteristic; both the Courts and the tribunals are ‘constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions’..... The basic and fundamental feature which is common to both the courts and tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State".

20. What has been held by the Apex Court has been summarised in paragraph No.60. Clauses (iv) and (v) of paragraph No.60 read thus:

> "(iv) An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression "Decree" in the Court Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and held that there are essential conditions for a "Decree".
>
> (a) that the adjudication must be given in a suit.
>
> (b) that the suit must start with a plaint and culminate in a decree, and
>
> (c) that the adjudication must be formal and final and must be given by a civil or revenue court.
>
> An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.

(v) **A legal fiction ought not to be extended beyond its legitimate field**. As such, an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a "Decree" for the purpose of Section 9(2) of the Insolvency Act". (Emphasis supplied)

21. In paragraph No.61 the Apex Court held that insolvency notice issued under section 9(2) of PI Act cannot be sustained on the basis of an arbitral Award. Thus, the sum and substance of the conclusion drawn by the Apex Court is that an arbitral Award is neither a "Decree" nor an "Order" for payment within the meaning of section 9(2) of the PI Act as a litigation is very different from arbitration in as much as the former is legal action in Court of law where the Judges are appointed by the State and the later is a resolution of the dispute between two contracting parties by persons chosen by them to be arbitrators. The persons chosen by the parties need not even necessarily be qualified as trained Judges or lawyers. The Apex Court has construed a decree to mean that the adjudication must be given in a suit by a civil or revenue Court which must start with plaint and culminate into a decree. Moreover, the adjudication must be formal and final and must be given by a Civil

or Revenue Court. The Apex Court has held that the legislature intended to give meaning to the words "Decree" or "Order" as understood in the said Code.

22. The first ground in the decision of Deepak Cochhar is that the words "Decree" or "Order" used in sub section 2 of section 9 are not qualified with the words "of any Court". The learned single Judge has referred to clauses (e) and (h) of sub section 1 of section 9 where the words "of any Court" are expressly used. Therefore, the learned single Judge held that the words "of any Court" have been deliberately not used by the legislature though it was conscious of the same because in the clauses (e) and (h) of sub section 1 of section 9 the said words have been used.

23. It will be necessary to refer to the submissions made before the Apex Court. The Apex Court in paragraph No.15 has noted a specific submission that in clauses (e) and (h) of sub section 1 of section 9 the phrase "in execution of the Decree of any Court for the payment of money" has been used and in sub-section 2 the words "of any Court" are absent. In paragraph No.18, the Apex Court has specifically noted the submission that the reference to term "any decree or order" which has become final and enforceable is irrespective of whether it is

passed by any Court, judicial authority, Tribunal etc and therefore, any such order could be the basis of the insolvency notice. The Apex Court has also noted a specific submission that when two words of different import are used in a statute in two consecutive provisions it will be difficult to maintain that they are used in same sense. While dealing with the said submission, the Apex Court referred to sub sections 2 and 14 of section 2 of the said Code which define "Decree" or "Order". In paragraph 40 the Apex Court recorded that the PI Act does not define "Decree" or "Order" for the simple reason that the meaning of these terms has been well settled since the Code of Civil Procedure of 1859 and 1882. In paragraph No.41 which is quoted in earlier part of this decision, the Apex Court has specifically held that both in Bombay Amendment and the Central Amendment, the legislature intended to refer only to the "decrees" and "orders" as defined in the said Code. In paragraph No.42 the Apex Court has referred to the statements of objects and reasons of 1978 amending act which brough sub-section 2 of section 9 of the statute book and in paragraph No.43, the Apex Court has held that the use of the words "litigant", "money decree", "judgment debtor", "decretal amount" and "decree holder" clearly shows that Parliament intended to deal with litigants who do not pay amounts decreed by Civil Courts. In

paragraph No.48 the Apex Court observed that by Courts it means Courts of civil judicature and by Tribunals those bodies of men which are appointed to decide controversies arising under certain special laws. The Apex Court further observed that all Tribunals are not Courts though all Courts are Tribunals. The view unequivocally taken by the Apex Court is that the words "Decree" or "Order" in sub section 2 of section 9 are liable to be construed with reference to its definition in the said Code. There are two reasons given by the Apex Court for adopting the said interpretation. The first reason is found in paragraph No.27 which reads thus:

> ". **We are of the view that The Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of 'civil death' for a person sought to be adjudged an insolvent and therefore the Act has to be construed strictly.**"

The second reason given by the Apex Court is that a legal fiction ought not to be extended beyond its legitimate field. The second reason was in the context of the fact that under section 36 of the Arbitration Act an Award is to be enforced in the same manner as if it were a decree of the Court.

24. Therefore, the view taken by the learned single Judge that it is not permissible to restrict meanings of the words "Decree" or "Order" by taking a recourse to definition of words under section 2 of the said Code is no longer correct. The view taken by the learned Judge that the words "in any Court" have not been deliberately used in sub-section 2 of section 9 by the legislature is also not correct in view of what is expressly held by the Apex Court. The view of the learned single Judge is that it is not permissible to give a restrictive meaning to the words "Decree" or "Order" as contemplated under sub section 2 of section 9 and it must be given widest possible interpretation so as to include each and every kind of recoveries which are adjudicated and have achieved finality. This is no longer a correct view in view of what has been held in paragraph Nos.27, 40, 41 and 43 by the Apex Court. The Apex Court held that the provisions of PI Act are required to be construed very strictly and the legal fiction cannot be extended beyond the permissible limits. Thus, it is held by the Apex Court that the words "Decree" or "Order" cannot be given a wide interpretation and the said words must be given the meaning as defined in section 2 of the said Code. Thus, in view of what has been now held by the Apex Court, the view taken by the learned single Judge

in Cochhar's case cannot be read as a binding precedent.

25. Now the question which needs to be considered is whether the Debt Recovery Tribunal is a Court as understood by the provisions of the said Code. A submission has been made by pointing out that pending suits have been transferred to the Debt Recovery Tribunal and there is a comprehensive procedure for adjudication which is on par with the suits. All these aspects indicate that the Debt Recovery Tribunal has trappings of a Court. In the State of Maharashtra, the hierarchy of the Courts has been established by the Bombay Civil Courts Act, 1869 and the Bombay City Civil Court Act, 1948. The provision of section 3 of the said Code will have to be naturally read in the context of the aforesaid enactments which create hierarchy of Courts. The reference to the 'Revenue Court' in the decision of Patheja's case is to the Revenue Court under sub-section 2 of section 5 of the said Code. In the decision of the Apex Court in the case of **Union of India Vs. Delhi High Court Bar Association (AIR 2002 SC Page 1479)** the Apex Court has held that the Tribunal constituted under the Debt Recovery Tribunal Act is a Tribunal and it is not a civil Court governed by the said Code. As indicated earlier, though the

Tribunal has the trappings of a Court but it will not become Court as understood under the said Code. In view of sub-section 2 of section 5 of the said Code, the Tribunal will not even become a Revenue Court. Thus, the said Tribunal cannot be a Court as understood by the said Code. Therefore, the order or recovery certificate issued by the Debt Recovery Tribunal is neither an order nor a decree within the meaning of section 9(2) of the PI Act. I have already held that the decision of this Court in the case of Deepak Cochhar is no longer a good law in view of the subsequent decision of the Apex Court.

26. Another question to be decided is whether there can be a notice under sub section 2 of section 9 of the PI Act on the basis of an Award made by the Co-operative Court in a dispute under section 91 of the Co-operative Societies Act. Section 91A deals with a constitution of Co-operative Courts. It was argued that the power to appoint members of the Co-operative Court vests in the State Government. Reliance is placed on rule 77A of the said Rules of 1961 which prescribe qualifications of Judges. The Limitation Act, 1963 is applicable to the disputes before the Co-operative Court. Section 94 deals with procedure for hearing of the disputes before the Co-operative Court.

27. The question is whether an award made or an order passed by the Co-operative Court is a "Decree" or "Order" within the meaning of section 9(2) of PI Act. The question is whether a Co-operative Court is a Court as understood by sub-sections (2) and (14) of Section 2 of the Code. In so far as Co-operative Court is concerned, though the nomenclature Court has been used, the said Court cannot be a Court as understood by the provision of the said Code in view of sections 3 and 5 of the said Code read with the provisions of 1869 and 1948 enactments referred to above. The Co-operative Court may have the trappings of 'a Court' but is not a Court as understood in the said Code. Therefore, the Award made by a Co-operative Court cannot be the basis on which insolvency notice can be issued. The Award is neither a decree or an order within the meaning of section 9(2) of the PI Act.

28. In so far as recovery certificate under section 101 of the Co-operative Societies Act is concerned, by no stretch of imagination the Registrar or Assistant Registrar who is empowered to grant certificate can be said to be a Court as understood in the said Code and hence, elaborate discussion is not required on this aspect. The order or the recovery certificate issued

by the Registrar is not an "order" under sub-section 2 of section 9 of the PI Act. The decision of this Court in the case of Rupchand R. Shah (supra) does not lay down that the Registrar is a Court as understood by the said Code. The order passed under section 101 is not a decree within the meaning of section 2 of the said Code.

29. Now, I will have to deal with an Award made in a dispute under section 84 of the Multi-State Societies Act. The power of appointment of arbitrator vests in the Central Registrar. Sub section 5 of section 84 provides that the provisions of The Arbitration and Conciliation Act, 1996 are applicable to all arbitrations under this Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration Act. Sub section 5 provides that the provisions of the Arbitration Act will apply save as otherwise provided under the Multi-State Societies Act. Section 85 of the Act is the only provision which makes a departure. The said section makes the provisions of the Limitation Act, 1963 applicable as if the dispute was a suit and the arbitrator is a Civil Court. However, this legal fiction will have to be applied only to the applicability of the said Act of 1963. It will be also necessary to refer to

Chapter XI of the Multi-State Societies Act. The said Chapter provides for a mode to execute every decision and order made under section 39, section 40, section 83 or section 99 or section 101 of the Multi-State Societies Act. Section 96 grants power to the arbitrator to attach a property before passing an Award. Thus, there is no specific provision under the Multi-State Societies Act which makes an Award executable under the said Act as if it is a decree of Civil Court and therefore so far as execution is concerned the same will be governed by the Arbitration Act. There is no appeal provided against the said Award in the Multi-State Societies Act. There is one distinction between the provisions of the Multi-State Societies Act and the Arbitration Act. Under the Arbitration Act choice of the arbitrators is with the parties except where section 11 is invoked in which case the Hon’ble the Chief Justice or his nominee can appoint the arbitrator. However, under the Multi-State Societies Act the arbitrator is always appointed by the Central Registrar. However, fact remains that the adjudication is not necessarily by a trained Judge or by a lawyer. The arbitrator appointed under section 84 cannot be said to be vested with the State’s inherent judicial powers. Therefore, in case of an Award by arbitrator appointed under section 84 of the Multi-State Societies Act, the law

laid down in the case of Paramjeet Singh Patheja (supra) will squarely apply. The award of the Arbitrator cannot be a decree or an order within the meaning of sub-section 2 of section 9 of the PI Act.

30. Therefore, the questions formulated in paragraph 1 are answered as under:

Question No.(i): The decision of the learned Single Judge is no longer a good law.

Question No.(ii): No.

Question No.(iii): No.

Question No.(iv): No.

Question No.(v) : No.

JUDGE